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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DALE FOSTER HOUSEAL AND
DAPHNE MARCELLA HOUSEAL

PETITIONERS

V.

THE STATE OF TENNESSEE

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE AT JACKSON

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT, BY REFUSING TO GRANT THE DEFENDANTS' MOTION TO SUPPRESS EVIDENCE, VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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OPINION BELOW

The opinion of the Tennessee Supreme Court has not been reported. The decision of the Tennessee Supreme Court, styled "Order" and filed by that Court on March 12, 1984, is appended to this Petition. Shelby Criminal C.C.A. No. 69. The judgment of the Court of Criminal Appeals of Tennessee, Jackson, April Session, 1983, affirming the trial court denial of the Defendants' motion to suppress, styled "Opinion" and filed by that Court is also appended to this Petition. A Petition for Stay of the Mandate and Continuation on Present Bond was filed and denied on March 29, 1984, by the Court of Criminal Appeals of Tennessee at Jackson. A copy of this order is appended to this Petition. On April 11, 1984, the Supreme Court of Tennessee granted a Stay of the Mandate and a Continuation on Present Bond for pur-

poses of this appeal. The order is appended to this petition.

JURISDICTION

The judgment of the Supreme Court for the State of Tennessee at Jackson was set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Amendments Four and Fourteen of the United States Constitution and 28 U.S.C. §1257(3). The provisions are fully set out below.

AMENDMENT IV

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT XIV

§1. All persons born or natura-

lized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held on authority exercised under, the United States.

STATEMENT OF THE CASE

On the 17th day of February, 1981,

Sgt. Joe Hamby of Metro Narcotics swore under oath before W. David Stinson, Judge, Division IV, General Sessions Court, Shelby County, Tennessee, to the following:

> "On February 17, 1981, the affiant talked with a reliable informer of Memphis, Shelby County, Tennessee who has given the affiant other information in the past which has been found to be true and correct and which has resulted in several narcotic arrests and drug seizures. This reliable informer has been in the above described residence (2269 Lynnfield, Memphis, Shelby County, Tennessee) and has seen the above described persons (Dale and Daphne Houseal) storing and selling Marijuana and LSD inside this residence."

With this oath, affiant obtained the issuance of a search warrant, which was executed on the date issued. A quantity of marijuana was seized, and Defendants arrested and charged with possession with intent to sell marijuana.

Counsel for the Defendants filed in the trial court a motion to suppress the evidence seized as being in violation of

the Fourth Amendment to the Constitution of the United States. In support of this motion, the Defendants submitted affidavits from nine (9) private citizens, who comprised all of the persons who were in the above residence during the timeframe set forth in the affidavit to the search warrant, stating they were not the informants. Also submitted were affidavits of the two Defendants affirmatively stating under oath that those were all of the persons who were in that residence during the timeframe pertinent to the search warrant. The Defendants alleged specifically that the affidavits introduced constituted more than a prima facie showing of either a knowingly false or recklessly false statement being utilized by the affiants in order to obtain the issuance of the search warrant; therefore, after the Court examined and extracted those portions which were false or

recklessly declared, as a matter of law, no probable cause would exist and, accordingly, the search warrant would be void as being obtained in violation of the Fourth Amendment. Defense counsel maintained possession of the true name affidavits of the nine private citizens to preserve their identity due to the reasonable fear for their safety should their identities become known, and provision was made for the Court's in camera inspection, should the Court have any question as to the accuracy or authenticity thereof. The hearing on the motion to suppress was held on July 9, 1981, with the trial judge ruling that the motion to suppress be denied due to the Defendants' failure to sustain their burden of proof.

The trial court granted the Defendants' request to reconsider the motion to suppress and, in conjunction with this hearing,

also entertained a motion to suppress evidence seized as a result of a search warrant secured by affiant Joe Hamby and executed on August 8, 1981, which resulted in the arrests of Dale Houseal and Jimmy Houseal for possession of methaqualone, possession with intent to sell marijuana, and possession with intent to sell LSD. Three affidavits were introduced into evidence as exhibits in support of these motions to suppress, providing additional proof to the allegations of a false statement made by the affiant in procuring the search warrants in both cases.

For the purpose of this appeal, it was stipulated that the informant was the same in regard to both search warrants now in question before this Honorable Court.

The introduction of these affidavits and the testimony of three witnesses provided sufficient proof to the fact that

Hollis Rick Maupin had previously expressed a desire to have the Defendants arrested for drug offenses in retaliation for past differences with them.

The proof presented also established clearly that Maupin was blind and had been for a number of years.

It was also shown that Maupin had been in contact with the affiant, Joe Hamby, on numerous occasions over the telephone. The Defendants contend that the affiant knew or should have known that the source of his information used to secure the issuance of the search warrant could not have seen marijuana sold or stored. In truth and in fact the informant was blind. The search warrants were void for lack of probable cause due to the use of a deliberately, or at best, recklessly false statement by the affiant. Once these statements are stricken, the very existence of probable cause is

negated, rendering the evidence seized inadmissible, as violative of the Fourth Amendment rights of the Defendants. The trial court failed to suppress the evidence seized as a result of the issuance of the search warrants outside the parameters of the Fourth Amendment.

ARGUMENT

I. WHETHER THE TRIAL COURT, BY REFUSING TO GRANT THE DEFENDANTS' MOTION TO SUPPRESS EVIDENCE, VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The protection of the Fourth Amendment

> "...consists in requiring that...inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."
>
> Johnson v. United States, 333 U.S. 10, 13-14 (1948).

These inferences must be drawn by the magistrate with knowledge of the "totality of the circumstances" surrounding the search

warrant hearsay. Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983). The affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause for the issuance of the warrant. 103 S.Ct. at 2532. His actions may not be a mere ratification of the bare conclusion of others. Id.

As to all indictments, the Defendants respectfully submit that the trial court erred by refusing to grant their motion to suppress evidence seized upon the execution of search warrants which were procured by the affiant's false statement, without which the existence of probable cause is negated.

The Petitioners assert that the statements sworn to under oath by the affiant, to the effect that a reliable informant had advised him that he (the informant) had been, within the past five days, inside the

Defendants' residences at 2269 Lynnfield on February 17, 1981, and 1120 Brower on July 31, 1981, and had seen the storage and selling of various drugs, were either deliberately false or were made with reckless disregard for the truth. There is abundant proof in the record that the informant was blind and, ergo, did not see.

This Honorable Court's decision in Franks v. Delaware, 438 U.S. 154 (1978), extends the scope of the exclusionary rule to hold that criminal defendants may challenge the veracity of factual allegations made in an affidavit supporting a search warrant.

In reversing Frank's conviction, this Court announced the conditions under which a defendant's challenge to the warrant affidavit is sufficient to entitle the defendant to a veracity hearing. Under the rule of Franks, if the defendant makes a

"substantial preliminary showing" that the warrant affidavit contained a false statement made knowingly and intentionally, or with reckless disregard for the truth, and if that false statement was crucial to the finding of probable cause, the court must conduct a veracity hearing to assess the defendant's challenge to the sufficiency of the warrant affidavit. At the veracity hearing, the defendant must establish by a preponderance of the evidence that the false statement was a product of the affiant's perjury or reckless disregard and that the deletion of the false statement renders the affidavit insufficient to establish probable cause.

The trial court and the Court of Criminal Appeals both agreed

> "...that the defendants in this cause failed to establish by a preponderance of the evidence, that the affiant to the warrants made false statements with intent to deceive the court, or made such statements essential to the

> establishment of probable cause, in reckless disregard for the truth."
>
> State v. Houseal, Shelby Criminal No. 69 (Tenn.Crim.App., Jackson, September 8, 1983).

What the learned judges of the trial court and the Court of Criminal Appeals have failed to recognize is that the standard enumerated in Franks is improper in the present case, should this Court not be convinced that the Franks standard has been met.

This Court in Franks considered the issue of affiant veracity with regard to the affiant's assertions about his own activities. 438 U.S. at 170. The statement challenged by the defendant was that named persons had made certain declarations to the affiant-officer. To meet his burden, the defendant had planned to call those two named persons to testify on his own behalf, a device which would not be open to him if the informer's identity were not

disclosed. The Court expressly chose not to consider the "difficult question" of whether a court must require disclosure of a confidential informant's identity once the defendant has cast sufficient doubt on the affiant's credibility. Id. Thus, the issue in the present case was left unresolved.

Because of the misapplication of the Franks standard to the present case, the Defendants in this cause have been substantially handicapped by the combined effect of the informer's privilege and procedural restrictions outlined in Franks. The Defendants contend that they did everything possible to show that the affidavit for the search warrant was based on false statements with intent to deceive the Court or in reckless disregard for the truth.

The individuals, who by affidavit had sworn to have been present in the residence

during the critical time period were in fact the only persons who were actually present (Vol. I, 4-6).

The Defendants established that the blind informant had both means, motive and opportunity as well as an overwhelming desire to procure their arrest. The lower courts failed to accept what would seem to be clear, cogent and convincing.

The Defendants also presented three witnesses, Clyde Michael Harris, Larry Wayne Jackson, and James Stephen Houseal. These witnesses established that, if there was an informant, it was Hollis Rick Maupin. Maupin, a mutual friend of the witnesses and who is the blind informant, had expressed a desire to have the Defendants arrested for drug possession (Vol. II, 8-19). Harris testified that James Houseal answered the telephone at Maupin's residence a few weeks prior to Dale and Daphne

Houseal's arrest on the other charge and recognized the voice on the other end to be that of Joe Hamby of Metro Narcotics, the affiant to both search warrants in this cause (Vol. II, 5-8). This was corroborated (Vol. II, 28-29). Larry Wayne Jackson, who testified to having answered the telephone on more than one occasion at the Maupin residence, stated that Joe Hamby had called for Maupin (Vol. II, 17-19). Further testimony revealed that the purpose for the phone calls from Hamby was an effort on the part of Maupin to get Dale and James Houseal busted due to a previous disagreement or argument (Vol. II, 19). The Defendants introduced into evidence the sworn testimony of James Houseal (Vol. II, 30-31), which stated that he had been a close friend of Maupin's and had told Maupin about the presence of marijuana in Dale Houseal's residence six to seven weeks

prior to the search of the residence.

It is further submitted to the Court that the line of cross-examination by the prosecution going to the degree of Maupin's blindness was a tacit admission that Maupin was the informant. All of the cross-examination by the State focused not on whether Maupin was the informant but as to the degree of blindness on Maupin's part (see, Cross-Examination, Vol. II). Based on the line of questioning by the State, they do not quarrel with the inference that Maupin is the informer.

With this body of proof for the Defendants and with not one iota of rebuttable evidence introduced by the State, the Court held that the Defendants failed to prove their cause by a preponderance of the evidence, the standard outlined by the Court in Franks. The status of the record and the rulings of the lower courts demon-

strate the need for further clarification of the proper standard.

Counsel is constrained to understand the apparent lack of concern by the lower courts with the integrity of process issued under oath, and the sanctity and solemnity thereof. The purity of the Temple of Justice should always be jealously guarded by the Courts themselves. It is submitted that the Court, presented and confronted with the record, evidence and testimony, was constrained to at least interview the informant in camera, if for no other purpose than to insure the integrity and purity of our system.

This is precisely why the Court in Franks specifically left unresolved the issue of whether a court must ever require disclosure of a confidential informant's identity once a substantial preliminary showing is made. For, without some type

of disclosure or some change in the burden of proof, the defendant is unfairly handcuffed and tied. If the defendant is unable to provide sufficient factual support for his allegations of misrepresentations in a warrant affidavit because the informant's identity is not disclosed to him, the Fourth Amendment's protection afforded by Franks becomes entirely chimerical.

If the standard of Franks is inadequate to give the Defendants in the present cause the "fundamental fairness" required by the constitutional mandates of the Court, just what is?

Counsel for the Defendants respectfully submits to this Court that the answer may be found by re-reading McCray v. Illinois, 386 U.S. 300 (1967), in light of the holding in Franks.

In McCray, the defendant argued that the trial judge had erred in refusing to

disclose the identity of an informant at a pre-trial hearing held to resolve a probable cause challenge to the sufficiency of a warrant. The Court rejected the defendant's argument and held that, if the judge is convinced of the informant's credibility and of the reliability of his information, the Fourteenth Amendment does not mandate disclosure of the informant's identity "upon mere demand". 386 U.S. at 307-08.

In upholding the trial court's ruling that the informant's identity could remain undisclosed, the Supreme Court relied principally on the opinion of Chief Justice Weintraub of the New Jersey Supreme Court in State v. Burnett, 42 N.J. 377, 385-388, 201 A.2d 39, 43-45 (1964), and on Professor Wigmore's description of the informer's privilege. 8 J. Wigmore, Evidence §2374 (McNaughton rev. 1961). The Court acknowledged that allowing the Defendants access

to the informant's identity compromises his usefulness to the state and discourages potential informants from offering information to the police.

The McCray Court, however, qualified the informant's privilege. The Court concluded that when the officer-affiant's credibility is a substantial issue, the magistrate, prior to issuance of the warrant, may order disclosure. 386 U.S. at 307-308. Likewise, when law enforcement officials have conducted the search without a warrant, the judge hearing the suppression motion may order disclosure of the informant's identity if he deems it necessary in order to determine the officer's veracity. Id. The McCray Court recognized the need for reconciling the defendant's interest in challenging the officer's veracity and the state's interest in protecting its informants. Id. at 307.

When the affiant-officer's credibility is suspect, the Court's opinion in McCray seems to acknowledge the necessity of disclosure. Franks involves a third scenario not addressed in McCray. In Franks, the law enforcement officials had a search warrant when they conducted a search. When the defendant satisfies the Franks "substantial preliminary showing" requirement, however, he has established the same need to verify the affiant's veracity and thus to disclose the informant's identity as existed in McCray.

When the defendant's conviction turns on whether probable cause existed for an arrest or search, and when that determination in turn depends upon the existence and reliability of an informer, as in the present case, the Court must require disclosure. Otherwise, the Court is incapable of making a rational appraisal, and the

police officer alone, he being "in the competitive business of ferreting out crime", conclusively determines the validity of his own actions. Without disclosure of the informant's identity, the defendant cannot "effectively contest the policeman's opinion as to [the informant's] reliability". See, generally, People v. Durr, 28 Ill.2d 308, 315, 192 N.E.2d 379, 382 (1963) (Schaefer, Klingbeil, Hershey, J.J., dissenting); Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 (1958); Scher v. United States, 305 U.S. 251 (1938); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Keown, 19 F.Supp. 639 (W.D.Ky. 1937); United States v. Blich, 45 F.2d 627 (D.C.Wyo. 1930); Smith v. State, 169 Tenn. 633, 90 S.W.2d 523 (1936).

The Petitioners recognize that the

superimposition of Franks on the array of cases dealing with the disclosure of an informant's identity necessitates a compromise to reconcile two conflicting interests. Analysis of the relevant concerns suggests acceptable compromises by establishing new standards for the burden of proof and by allowing in camera disclosure in certain situations.

If the challenged warrant's probable cause assertion is based on the word of an undisclosed informant, as in the present case, the Petitioners contend that this Court should require in camera disclosure of the informant and grant the defendant a veracity hearing when two conditions are present: first, when the probable cause portion of the complaint for search warrant is supported either entirely or primarily by an undisclosed informant; and, second, when the defendant puts the officer's

veracity in issue to the satisfaction of the judge hearing the motion for a veracity hearing. When the policeman has relied upon an informant, the burden that the Court should place on the defendant attempting to challenge the policeman's veracity is necessarily vague. To be fair and to serve the goals established by Franks, the burden imposed on the defendant should not be as high when an informant is involved as when the policeman relied on his own first-hand knowledge.

The very hearsay nature of the policeman's assertions makes the defendant's task of casting doubts on the policeman's veracity considerably more burdensome. Hearsay evidence reported by the affiant

> "has the result of immunizing hearsay from while subjecting the direct testimony to contradiction, and under such a rule the police have everything to lose and nothing to gain for producing the informants directly to the magistrate, whereas the thrust should be the other way. In practice,

> it would seem that inquiry into truthfulness of what was told to the officer would not be burdensome, inasmuch as the usual question is whether the police have fabricated an informer or an important part of his purported information; it would be a very rare situation in which the police are hoodwinked by a Barron Murchason.
>
> Model Code of Pre-Arraignment Procedure 569 (Proposed Official Draft, 1975).

Since the issue in the suppression hearing is whether the policeman lied and not whether the informant lied, the judge should be able to make this determination by listening to the informant's testimony without the Defendants' presence or cross-examination by the Defendants. In this way, the policy arguments protecting the informant's identity and the defense's claims of police perjury are met. The in camera proceeding could also be sealed and preserved for review, further protecting the defendant's interests.

The prosecution should be able to

avoid disclosure of the informant and the veracity hearing only by proving by a preponderance of the evidence that the challenge to the officer's veracity is unfounded.

Under the Defendants' proposal here, in camera disclosure would be required only if the probable cause portion of the complaint for the search warrant is supported either primarily or entirely by an undisclosed informant and the defendant casts sufficient doubt upon the policeman's credibility. The Second Circuit suggested the limitation in a similar context in a post-McCray case, United States v. Commissiong, 429 F.2d 834 (2d Cir. 1970). In that case, the Court considered a challenge to a warrantless arrest and subsequent search for which probable cause had been established, at least in part, by the tip of an undisclosed informant. The Second Circuit, how-

ever, found that material other than the information obtained from the warrant justified the arrest and search. On that basis, the Court denied disclosure, stating that disclosure of the informant's identity would only be required when the informant's assertions constitute the "essence or core or main bulk" of the probable cause evidence. 429 F.2d at 838. Thus, the Court acknowledged the requirement of independent evidence which would in itself safeguard against fabrication, "although obviously not a complete one". 429 F.2d at 839. Other post-McCray decisions have expounded a rule similar to the Second Circuit's in Commissiong. See, United States v. Colon, 419 F.2d 210 (2d Cir. 1969); United States v. Malo, 417 F.2d 1242 (2d Cir. 1969); United States v. Cuppabimca, 398 F.2d 356, 358-59 (2d Cir. 1968), cert. denied, 393 U.S. 935, 946 (1968); United States v.

Shyvers, 385 F.2d 837 (2d Cir. 1967).

Although Defendants' contention here applies to judicial review of searches made pursuant to a search warrant, while Commissiong dealt with a warrantless arrest and search, the interest vindicated is common to both settings: the integrity of the warrant requirement. Although the Court has shown a predisposition to presume the constitutionality of searches made pursuant to a warrant, United States v. Ventresca, 380 U.S. 102 (1965), the Franks opinion confirms that the mere fact that a search was made incident to a warrant does not preclude review of the veracity of warrant affidavits. Therefore, the analogy from the warrantless situation to the warrant situation is justifiable in light of Franks.

Ex parte in camera examination of the informant by the Court allows the Court to evaluate the affiant's credibility without

prematurely or needlessly exposing the informant's identity. The proposed accommodation of Franks and McCray is reasonable, for the police may always avoid revelation of the identity of confidential informants by not entirely or primarily relying on those informants for the probable cause assertion in the warrant application.

For Franks v. Delaware to have the effect intended, this Court must recognize the precise problem resolved in that case--intentional falsification in the warrant affidavit by law enforcement officials.

It is accordingly prayed that this Honorable Court reach the following conclusions, which we submit the law and facts require:

1. The standards outlined by Franks v. Delaware are inapplicable to the present case.
2. If the challenged warrant's pro-

bable cause assertion is based on the word of an undisclosed informant, this Court should require in camera disclosure of the informant and grant the defendant a veracity hearing when two conditions are present:

a. When the probable cause portion of the complaint for search warrant is supported either entirely or primarily by an undisclosed informant.

b. When the defendant puts the officer's veracity in issue to the satisfaction of the judge hearing the motion for a veracity hearing.

Respectfully submitted,

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APPENDIX

IN THE CRIMINAL COURT OF SHELBY COUNTY,
TENNESSEE
DIVISION II

STATE OF TENNESSEE,)
)
VS:) NO. 78900
)
DALE FOSTER HOUSEAL
and DAPHNEY MARCELLA)
HOUSEAL

ORDER DENYING MOTION TO SUPPRESS

The Defendants, Dale Foster Houseal and Daphney Marcella Houseal, filed a Motion to Suppress the seizure of controlled substances, pursuant to a search warrant, on February 17, 1981, through their Attorney of record, Mr. J. Fred Friedman. The defendants contend that the affidavit of the search warrant contained known false statements or reckless state-

ments utilized by the affiant to obtain the issuance of the search warrant. In support of these allegations, the defendants filed nine (9) affidavits of various citizens of Shelby County, Tennessee that they had not seen controlled substances, more specifically, marihuana and/or LSD, stored or sold in the defendants' home; nor furnished any such information to any law enforcement officers that such events were or are taking place. These affidavits were submitted by all persons who were allegedly on the defendants' premises at 2269 Lynnfield Road between the dates of February 11 and 17th, 1981.

On February 17, 1981, Sgt. Joe Hamby of the Memphis and Shelby County Narcotis [sic] Squad obtained a search warrant for the defendants' residence at 2269 Lynnfield Road, Memphis, Tennessee. Sgt. Hamby accompanied by various members of the narcotic squad executed the search warrant on the 17th and seized a quanity [sic] of con-

trolled substance, to-wit: marihuana. The search warrant was marked as exhibit eight to the motion. From a review of the search warrant's affidavit the search warrant sets out sufficient facts by which a magistrate could make an independent determination that probable cause exists for the purpose of issuance. The affidavit meets the rule as required by U.S. v. Harris 91 S.Ct. 2075, Dishman v. State 460 S.W.2d 855 and Woods v. State, 552 S.W.2d 782.

Prior to 1978, a defendant could not go behind the fact of a search warrant to attack the sufficiency of probable cause in the affidavit. This rule has now been changed in Tennessee as set out in Little v. State 560 S.W.2d 403. Our Supreme Court set out two circumstances that authorize the impeachment of a search warrant's affidavit sufficiencies on its face; (1) a false statement made with intent to deceive the court whether material or immaterial to the issue of probable cause; and (2) a false

statement essential to the establishment of probable cause, recklessly made. A party attacking a facially sufficient affidavit must submit prima facie proof of grounds for such attack, Woods v. State 552 S.W.2d 782 and U.S. vs. Luna 525 Fed 4. Franks v. Delaware 98 S.Ct. at 2676 states that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the officer in the warrant, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. The defendants contend that their affidavits establish prima facie proof and/or substantially show that they are entitled to a hearing. The Court does not agree with the defendants' premise that these affidavits in and of themselves constitutes a prima facie case, but the defendants should be given an opportunity

to be heard.

Sgt. Joe Hamby of the Narcotic Squad testified in essence that he received the information as set out in the search warrant from a confidential informant who had personal knowledge of the defendant's involvement in storing and selling controlled substances within the time frame of February 11 to 17, 1981. In addition, Sgt. Hamby testified that he had been investigating the defendants for several years and in January 1981, the informant had taken Sgt. Hamby by the defendants' residence. The Court also held an in chambers hearing with Sgt. Hamby concerning the exact date the informant was present in the defendants' home. This testimony was sealed.

The Court is of the opinion that Franks v. Delaware Supra controls the facts adduced in this hearing.

Justice Blackmun held at page 2684:

> "There is, of course, a presumption of validity with respect to the affidavit supporting the search war-

rant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant."

This Court held that the defendants have failed to carry their burden in establishing that the affiant, Sgt Hamby, made any deliberate false statement to declare the issuing magistrate or there was a knowingly and intentionally reckless disregard for the truth.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants motion to suppress the search warrant is hereby denied.

Enter this 12th day of November, 1981.

/s/
JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, APRIL SESSION, 1983

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 69
	)	
v.	)	SHELBY CRIMINAL
	)	
DALE FOSTER HOUSEAL and DAPHNEY MARCELLA HOUSEAL,	)	Hon. L. T. Lafferty, Judge
	)	
Appellants	)	(Appeal of Denial of Motion to Suppress)

FOR APPELLEE:

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AFFIRMED

OPINION FILED: Sep 8 1983

CHARLES H. O'BRIEN, JUDGE

O P I N I O N

This case originated in the Criminal Court for Shelby County. In Indictment No. B-78900 both defendants were charged with possession of marijuana with intent to sell and deliver. Under Indictments No. 82546-547-554, Dale Foster Houseal was charged with various possessory offenses. In Case No. 78900 each of them entered a guilty plea to an attempt to commit a felony. Dale Houseal was sentenced to serve not less than two (2) years nor more than five (5) years in the penitentiary. Daphne Houseal was sentenced to serve not less than one (1) year nor more than one (1) year in the County Jail, and fined One Thousand Dollars ($1,000). Her sentence of confinement was suspended and she was placed on probation for a period of five

(5) years. In Cause No. 82546 Dale Houseal was also sentenced to serve not less than (2) years nor more than five years. In 82547 his sentence was not less than one (1) year nor more than one (1) year. All of these sentences were fixed to be served consecutively. In Case No. 82554 he was sentenced to serve a period of six months, concurrent with his other sentences. The trial judge entered an order certifying the cases to this Court on two questions of law pursuant to the provisions of Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure. The issues stated in the court order are: (1) did the trial court rule correctly on the procedural aspects of the suppression motion? (2) was it error to deny the defendant's motion to suppress evidence?

Defendants do not specify the manner in which the trial court purportedly erred in its rulings on the procedural aspects of the motion to suppress. They seem to

imply that the evidence supplied by them at the hearings on their motions to suppress establish, by a preponderance of the evidence, the absence of probable cause, and thus rendered the search warrants void. It is insisted they have proved that either there was no reliable informant who provided the information to the affiant on the search warrant, or that they established by their evidence that the actual informant was a man named Hollis Rick Maupin, who was legally blind, and could not have provided the information ascribed to him in the affidavit to the warrant. It is also said they were limited by the court in their cross-examination of the affiant to the search warrant in their effort to prove the falsity of his statements in the affidavit to the warrant. Defense counsel has filed an excellent brief in support of these arguments, and has correctly cited the law and the cases which sustain the argument. However, after having carefully studied this

record we have concluded the facts in this case do not comport with those in the cases cited on defendant's behalf.

A defendant must initially show by affidavit of persons having personal knowledge of the facts, or other evidence, that the search warrant was procured by the officers either through perjury or collusion before one can delve below the surface of a facially sufficient affidavit. The mere unsupported allegation of fraud is insufficient. In United States v. Luna, 525 F.2d 4, (6th Circuit, 1975), it was held that evidence should not be suppressed unless the trial court finds that the warrant is obtained by actual fraud or collusion. An innocent or mere negligent misrepresentation is not sufficient to invalidate a warrant or nullify a search.

There were two search warrants issued in these cases, on separate dates, addressed to different locations. Defendants' motion to suppress sets forth that affidavits upon

which the search warrants were based were materially false, containing willful or reckless misrepresentations of the applicant to the issuing magistrate. The motion was supplemented by affidavits of nine (9) persons who say they were on the searched premises during the critical time when the affiant to the search warrant stated his informant saw drugs sold and stored at that location, and that they had not seen any such activity. There were also affidavits from the defendants deposing that they were aware of the identity of all persons who had given affidavits, and that they were all of the persons who were lawfully on the premises during the time in question, other than the defendants themselves. Under the authority of Tennessee Rule of Criminal Procedure No. 41(f), defendants were entitled to present evidence in support of their motion to suppress the evidence obtained under the warrant. They were afforded this right. In Franks v. Delaware,

438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, (1978), the United States Supreme Court said:

> " . . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

We agree with the trial court that defendants did not establish, by a preponderance of the evidence, that the affiant to the warrants made false statements with the intent to deceive the court, or made such statements essential to the establishment of probable cause, in reckless disregard for the truth. See State v. Little,

560 S.W.2d 403, (Tenn. 1978). Defendants did not establish that Hollis Rick Maupin was the informer. The great bulk of the evidence introduced applied to the warrant and the search under Indictment No. 78900. There was very little, if any, evidence introduced in relation to the search warrant issued under the other indictments. It was never established that the informant was the same under both warrants. It was never established that the nine individuals who deposed they were in defendant's residence during the five days before the issue of the warrant in Case No. B-78900 were the only persons who were in that residence during that time except by the affidavits of defendants. There was more than one hundred pounds of marijuana seized in the search of defendants' residence. There were large plastic bags, and boxes, as well as drug dispensing paraphernalia scattered throughout the house. Although a search cannot be justified by the evidence it pro-

duces, Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927), this evidence was certainly admissible to attack the credibility of those witnesses who said they had been in the house during the critical period of time in question and had not seen any marijuana stored there. Defendants were not unduly limited in the scope of their cross-examination of the police officer. It was not incumbent upon the court to require the State to come forward with information establishing the truthfulness of the allegations in the search warrant affidavit, or to reveal the informant's identity. It must be noted that the police officer affiant had been twice tested. If the magistrate before whom he appeared with the application for the search warrant had doubted his credibility he had the authority to require that the informant be identified. See McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967). The trial judge in this

case held an in camera hearing in which he could have insisted on disclosure of the informant's identity to satisfy himself on the issue of the officer's credibility. He found it not necessary to do so. On the evidence in this case we are in accord with that resolution. The issue at the suppression hearing was not whether the informant had lied, but whether the affiant had reasonable cause to rely on the information received from him and, based on that information, set out probable cause in the affidavit to the warrant with falsification on his part. After an extensive and far ranging examination of the issue the trial judge in this case was satisfied in that regard. We have found nothing in the record to warrant overthowing [sic] his judgment.

We affirm the judgment of the trial court.

/s/
CHARLES H. O'BRIEN,
JUDGE

CONCUR:

/s/
ROBERT K. DWYER, JUDGE

/s/
JERRY SCOTT, JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, APRIL SESSION, 1983

STATE OF TENNESSEE, Appellee,	)	No. 69
v.	)	
DALE FOSTER HOUSEAL and DAPHNEY MARCELLA HOUSEAL, Appellants,	)	SHELBY CRIMINAL

ORDER ON PETITION TO REHEAR

Defendants have brought a petition to rehear insisting the court's opinion incorrectly states the material facts in the record.

The petition reiterates the argument on the facts previously considered by the court and is respectfully denied.

/s/
CHARLES H. O'BRIEN, JUDGE

/s/
ROBERT K. DWYER, JUDGE

/s/
JERRY SCOTT, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, Plaintiff-Appellee,	)	
vs.	)	Shelby Criminal C.C.A. No. 69
DALE FOSTER HOUSEAL and DAPHNE MARCELLA HOUSEAL, Defendant-Appellants.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellants.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

AT JACKSON

APRIL SESSION, 1983

STATE OF TENNESSEE APPELLEE	X X X	
	X	NO. 69
V.	X	
	X	SHELBY CRIMINAL
DALE FOSTER HOUSEAL and DAPHNE MARCELLA HOUSEAL	X X X	
APPELLANTS	X	

ORDER ON PETITION FOR

STAY OF MANDATE

AND CONTINUATION ON PRESENT BOND

This Court affirmed defendant's conviction on September 8, 1983. The Supreme Court denied permission to appeal on March 12, 1984.

Defendant seeks a Stay of Mandate for a period not to exceed sixty (60) days within which to file and perfect an appeal for review in the United States Supreme Court and a continuation of defendant's bond in the penal sum of Seventy Thousand

($70,000.00) during that time.

It appears to the Court that there is no substantial issue which would result in a reversal of this Court's opinion by the United States Supreme Court. It is, therefore, ordered, adjudged, and decreed by the Court that the Petition for Stay of Mandate and Continuation on the Present Bond be and the same hereby is denied.

Enter, this the 29th day of March, 1984.

[unsigned]
CHARLES H. O'BRIEN,
JUDGE

/s/
ROBERT K. DWYER, JUDGE

/s/
JERRY SCOTT, JUDGE

[Handwritten note: "I would grant the stay of Mandate and continuation of defendant's Bond in accordance with T.R.A.P. Rule 42(c) & Tenn.Cr.App. Rule 15.
/s/
CHARLES H. O'BRIEN"

FILED
APR 11 1984
JEWEL REDDEN, CLERK

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, Appellee	)	
VS	)	SHELBY CRIMINAL
DALE FOSTER HOUSEAL and DAPHNE MARCELLA HOUSEAL, Appellants	)	

O R D E R

Upon application of defendants to stay the mandate, response of the State in opposition thereto, and oral argument before the undersigned member of the Court,

It is ORDERED that the mandate of the Court of Criminal Appeals to the trial court be and it is hereby stayed pending (1) the timely filing of a petition for review in the United States Supreme Court and (2) final disposition by that Court; but to issue promptly, if said petition is not timely filed or the petition is denied, all provided defendants present bond of $70,000 remains in full force and effect.

Enter this the 11th day of April, 1984.

Wm H D Flores

BEST AVAILABLE COPY